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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/156,952	09/18/1998	ROY A. OSTGAARD	CYM-025	1770

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BOSTON, MA 02110

EXAMINER

BEX, PATRICIA K

ART UNIT	PAPER NUMBER
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1743

32

DATE MAILED: 09/11/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/156,952

Applicant(s)

OSTGAARD ET AL.

Examiner

P. Kathryn Bex

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 16 August 2002.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-8, 10 and 12-26 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-8, 10 and 12-26 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). _____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____.

DETAILED ACTION

1. Any rejection and/or objection not repeated herein has been withdrawn.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35

U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
 2. Ascertaining the differences between the prior art and the claims at issue.
 3. Resolving the level of ordinary skill in the pertinent art.
 4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
4. Claims 1-8, 10, 12-26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brodner (USP 5,894,733) in view of Moore (USP 5,855,289).

Brodner teaches the use of polypropylene (column 3, lines 11-13) container body 12 comprising an outer surface, an open end and closed bottom end (Fig. 2). The vial comprising a plurality of integral anti-rotation lugs 56 about the outer surface of the cylindrical body (Figs. 2-3). Wherein the anti-rotation lug comprises a flat, longitudinally disposed surface extending radially outwardly from the body outer surface, which is substantially perpendicular to the body of the vial. Moreover, the surface of the plurality of anti-rotation lugs is accessible when the cap 24 of container 14 is engaged with the neck of vial 12 (Fig. 4). Additionally, the lugs have a

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lowermost edge that is located closer to the open end than to the closed end (Fig. 2). Moreover, Brodner discloses a seal means 32 and 52 disposed between the body and the cap, which seals fluid within the container to assist in long term preservation of contents (Figs. 2-3). Brodner does teach the vial comprising a identification markings 72 (column 1, lines 27-42, column 4, lines 4-10). Brodner does not specifically recite a first alignment marker on the body on the cap and a second alignment marker on the body or the cap comprising a torque pattern with a plurality of radially disposed ribs.

Moore teaches a sample vial for use in an automated test apparatus comprising a body with an outer surface, an open end, a closed end, a cap 34 releasably engagable with the body. The cap comprising an outer surface and a torque pattern (Fig. 1 & 3) on the outer surface, wherein the torque pattern comprising a plurality of radially disposed ribs 64. The vial includes seals 54, 98 disposed between the body and the cap so as to be capable of forming a substantially fluid-tight seal therebetween. Moore teaches the cap comprising first screw threads 62 (Fig. 4) and a second mating screw thread 80 on the body (Fig. 1). Additionally, Moore teaches sample fluid level indicia 108 comprising an upper fill line and a lower fill line on the outer surface of the vial body (Fig. 1). Moore teaches a first alignment marker 110 on the body on the cap and a second alignment marker 108 on the body (column 7, lines 24-40). Moreover, Moore teaches a proximate structure comprising a storage container and vial sleeve 26 (Figs. 1-2).

Moore teach the creation of a fluid-tight seal formed between the body and the cap. However, neither Brodner nor Moore do disclose the specific range of torque between 5 and 50 inch-pound of torque applied to the cap. It would have been obvious to one having ordinary skill in the art at the time the invention was made to have included in the invention of Brodner and

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Moore the range of torque between 5 and 50 inch-pound of torque applied to the cap in order to ensure the cap and vial are properly sealed and prevent the leakage of a sample or air from the vial. Further, it has been held that where the general conditions of a claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. *In re Aller*, 105 USPQ 233.

Accordingly, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have included in the invention of Brodner a first alignment marker on the cap and a second alignment marker on the body, as taught by Moore, in order to insure a fluid-tight seal after a predetermined amount of rotational movement has been achieved between the cap and the vial. Thereby preventing the possibility of damaging the seal by over tightening the cap (column 7, lines 24-34).

Response to Arguments

5. Applicant's arguments with respect to claims 1-8, 10, 12-26 are have been considered but are moot in view of the new ground(s) of rejection. See above Office Action.

Conclusion

6. No claims allowed.

7. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after

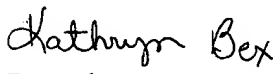
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the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

8. Any inquiry concerning this communication or earlier communications from the examiner should be directed to P. Kathryn Bex whose telephone number is (703) 306-5697. The examiner can normally be reached on Mondays-Thursdays, alternate Fridays from 6:00 am to 3:30 pm EST. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jill Warden can be reached on 308-4037.

The fax number for the organization where this application or proceeding is assigned is (703) 872-9310 for official papers prior to mailing of a Final Office Action. For after-Final Office Actions use (703) 872-9311. For unofficial or draft papers use fax number (703) 305-7719. Please label all faxes as official or unofficial. The above fax numbers will allow the paper to be forwarded to the examiner in a timely manner.

Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-0661.


P. Kathryn Bex
Patent Examiner
AU 1743
September 9, 2002


Jill Warden
Supervisory Patent Examiner
Technology Center 1700